93-617

Supreme Court, U.S.
FILED
OCT - 4 1993
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIE J. DUNN, ET AL.

PETITIONER

VERSUS

WILMA D. SIMS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF ALABANA

CASE NO. 1911395

PETITION FOR WRIT OF CERTIORARI

Willie J. Dunn
PRO SE
4028 Juanita Circle
Roosevelt City, AL 35020
205/424-1776

QUESTIONS PRESENTED

1. Whether the Supreme Court of Alabama erred in enforcing the settlement agreement on an issue which was not properly preserved for review and one only raised by amicus curiae?

2. Whether the Due Process and Equal Protection Clause of the Fourteenth Amendment vindicate the denial, violation or abridgement of procedural due process rights- the right to a fair trial, a fair tribunal, notice and the right to be heard?

3. Whether there is a conflict in the courts of Alabama regarding the enforcement of settlement agreements pursuant to Section 34-3-21, Code of Alabama(1975) and Rule 47, Alabama Rules of Appellate Procedure in juxtaposition with Rule 1, Alabama Rules of Appellate Procedure and the due process clause of the Fourteenth Amendment to the U.S. Constitution?

LISTING OF ALL PARTIES

The following constitues a listing of all parties to this case:

Susan B. Dunn, wife of petitioner

The estate of Liela P. Dunn, deceased mother of petitioner

Wilma D. Sims, defendant/respondent

Attorney Charles P. Gaines, attorney of record representing respondent

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REFERENCE TO OFFICIAL OPINIONS

R-336 Petition for writ of mandamus overruled

R-347 Petition for rehearing overruled

R-450 Judgment, enforcing settlement agree-

ment.

CAS-p.008 Post-trial order denying new trial

Mar. 31, 1992 Order, Supreme Court of Alabama placing case in the Alabama Court of Civil Appeals

Apr. 24, 1992 Opinion of the Alabama Court of Civil Appeals reversing and remanding this case to the trial court

May 22, 1992 Alabama Court of Civil Appeals modifies opinion, denies application for rehearing

Aug. 21, 1992 Writ of certiorari granted by the Supreme Court of Alabama

Sept. 8, 1992 Order, granted until September 11, 1992 to file appellant's brief

Oct. 1, 1992 Case submitted on brief

May 28, 1993 Supreme Court of Alabama renders its opinion reversing the Alabama Court of Civil Appeals

July 23, 1993 Appellant's application for rehearing overruled

Aug. 27, 1993 Case remanded to the Alabama Court

Sept. 8, 1992 Certificate of Judgment served upon petitioner

STATEMENT OF JURISDICTION

This Court's jurisdiction found under 28 U. S.C.A. §1254(1) and the fact that petitioner invoked the protection of the Fourteenth Amendment to the U.S. Constitution as early as May 11, 1991 while this case was in the trial court (R-297-298).

(i) Judgment entered May 28, 1993

(ii) Rehearing overruled July 23, 1993

(iv) 28 U.S.C.A., §1254(1)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

First Amendment:

Congress ahall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the govern-

ment for redress of grievances.

Fourth Amendment:

The right of people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Fourteenth Amendment:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Alabama(1901)

Article I, §6:

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may , by a general law, provide for a change of venue at

the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time application for change of venue, the defendant is imprisoned in jail or some legal place confinement.

Article I, § 11 Right to trial by jury.

Article I, § 13 Courts to be open; remedies for all injuries; impartiality of justice

That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Amendment No. 328

6.02. The supreme court.

(a) the supreme court shall be the highest court of the state and shall consist of one chief justice and such number of associate justices as may be prescribed by law.

(b) The supreme court shall have original jurisdiction (1) of cases and controversies as provided by this Constitution, (2) to issue such remedial writs or orders as may be necessary to give general supervision and control of courts of inferior jurisdiction, and (3) to answer questions of state law certified by a court of the United States.

(c) The supreme court shall have such appellate jurisdiction as may be provided by law.

Statutes:

Section 12-3-16, Code of Alabama(1975)

The decisions of the supreme court shall govern the holdings and decision of the courts of appeals, and the decisions and proceedings of such courts of appeals shall be subject to the general supertendence and control of the supreme court as provided by constitutional amendment No. 328.

Section 34-3-21, Code of Alabama(1975)

An attorney has authority to bind his client

in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court.

28 U.S.C.A., §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certioriar granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Alabama Rules of Appellate Procedure (A.R.A.P.)

Rule 1. Scope of Rules

These rules govern appeals to the Supreme Court, the Court of Civil Appeals, and the Court of Criminal Appeals, and proceedings on petition for writs or other relief which these courts or judges thereof are enpowered to grant. All cases appealable to the Court of Criminal Appeals shall be governed by those rules contained herein which are applicable to appeals to that court; and, pretrial appeals by the state in criminal cases shall be governed also by the rule of criminal procedure

providing for such appeals. These rules shall not be construed to extend or limit the jurisdiction of these appellate courts as established by constitution or law. They shall be construed so as to assure the just, speedy, and inexpensive determination of every appeallate proceeding on its merits. (Amended effective April 1, 1984.)

Rule 39(k) Review of Decisions of Courts of Appeals

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to pertinent portions of the clerk's record and reporter's transcript, and it will be considered

along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the Court of Criminal Appeals on certiorari, the Supreme Court may notice any plain error or defect in the proceeding under review, whether or not brough to the attention of the trial court, and take appropriate action by reason thereof, whenever such error has or probably has adversely affected the substanial rights of the petitioner.

Rule 47. Agreement in Writing

No private agreement or consent between the parties or their attorneys relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby; provided, however, agreements made in open court or at pretrial conference are binding whether such agreements are oral or written.

Alabama Rules of Civil Procedure(A.R.C.P.)

Rule 1.Scope of Rules

(a) Scope. These rules govern procedure in the circuit courts and in courts of full, like jurisdiction, in the district courts as provided in sub-paragraph "(dc)' of each rule, in the small claims courts as provided in Rule N of the Small Claims Court Rules, and in all other courts where appeals lie directly to the Supreme Court or Court of Civil Appeals, in all suits of a civil nature, including those in which the State of Alabama or a political subdivision thereof is a party, whether cognizable as cases at law or in equity, except probate courts not exercising statutory equitable jurisdiction, and proceedings enumerated in Rule 81, and other exceptions stated in Rule 81.

(b) These rules effect an integrated procedural system vital to the efficient functioning of the courts.

(c) These rules shall be construed to secure the just, speedy and inexpensive determination of

every action.

Rule 5. Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served upon each of the parties. No service need br made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be

made upon the person having custody or possession of the property at the time of the seizure.

Rule 12. Defenses and objections-When and how presented-By pleading or motion-Motion for judgment on the pleadings.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granded, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a

claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(g) Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provid-

ed in subdivision (h)(2) hereof on any of the grounds there stated.

Rule 78. Motion Day. Each circuit shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provisions by rule or order for submission and determination of motions not seeking final judgment without oral hearing upon written statements of reasons in support and opposition.

Alabama Canons of Judicial Ethics(1975)

Canon 3(C)(1)(a)

Canon 3. A judge should perform the duties of his office impartially and diligently.

The judicial activities of a judge take precedence over his other activities. His judicial duties include all the duties of his office pre-

scribed by law. In the performance of these duties, the following standards apply:

C. Disqualification:

(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

STATEMENT OF THE CASE

Facts Material To The Questions Presented

On May 17, 1991, petitioner made application to the Supreme Court of Alabama for a writ of mandamus directed to the Honorable Jerry Fielding, Circuit Court, Talladega County, Alabama, for a stay of an order entered on the same day defendant motioned for it, without giving petitioner an opportunity to oppose it. It also sought an order removing the trial judge from

this case on the ground that he had shown a personal predisposition of bias and prejudice toward petitioner. It was further shown that the trial court had denied petitioner due process rights, invoking the protection of the First, Fourth (Fourteenth) and Seventh Amendments to the U.S. Constitution. The manner in which the federal questions were raised was as follows:

> "Petitioner filed an objection on the grounds that the complete personnel and employment files of he contained privileged and confidential information; that to provide such information to defendant constituted an abridgement of a substantive right protected by the First, Fourth (Fourteenth) and Seventh Amendments to the Constitution." (p.7)
>
> "The right to substantive due process, a fair trial, and a fair tribunal are fundamental to our judicial process. These rights should not be abridged because of a trial judge's personal bias and preju-

dice toward a litigant. In this case the petitioner." (p.8)

"The First Amendment protects freedom of speech. While written "letters, notes, memos, and other matter" may not be considered as speech, petitioner advances the theory that speech encompasses the thought processes which produced the letter, memo, or any other written matter. Therefore, to make petitioner's letters, memos, and any other written matters available to a none interested party constitutes an abridgement of a substantive right." (p.8)

"The writ should be issued because the Fourth (Fourteenth) Amendment guarantees petitioner privacy rights; protection from unreasonable searches (Petitioner advances the position that the production of his writings constitutes unreasonable searches of his written matter.); and the due process." (p.8)

"2. Whether a stay of the Court's Order Entered May 8, 1991, would protect the funda-

> mental principles of fairness (right to a fair trial, to a fair tribunal) and substantive due process guarantees." (p.11)
>
> (See Petition For Writ Of Mandamus, filed May 17, 1991, R-300)

On May 31, 1991, the Supreme Court of Alabama overruled the petition. At this point, the case had gone forward for eleven months at the trial court level.

On May 16, 1991, petitioner filed objection to the trial court entering an order on the same day defendant motioned for it without giving petitioner an opportunity to be heard in opposition thereto, invoking the protection of the Fourteenth Amendment, to wit:

> "That the production of the information sought would infringe upon constitutional rights guaranteed under the First, Fourth, (Fourteenth) and Fifth Amendment." (R-338)

The trial court did not dispose of this objection nor did it act on these constitutional rights. At this juncture, the case had been be-

fore the trial court for eleven months.

On May 28, 1991, petitioner filed objection to the defendant's motion to enforce the settlement agreement on the ground that for the trial court to do so would deny he the right to a trial by jury under the Seventh Amendment. The manner in which the federal question was raised was as follows:

> "Objects on the ground that to enforce the agreement would deny plaintiff the 7th Amendment guarantee, i.e., the right to a jury trial." (R-344)

The trial court did not act on this constitutional guarantee. The case had now gone forward for twelve months.

On June 14, 1991, petitioner made application to the Alabama Supreme Court for a rehearing de novo regarding his writ of mandamus, arguing that if the trial court's order of May 8, 1991 were allowed to stand, it would abridge substantive rights protected by the First and Fourth Amendments, to wit:

> "Appellant filed objection on May 11, 1991, arguing that appellant's personnel files contained confidential privileged information and that for said information to be disclosed to a non-interested party constituted an abridgement of substantive rights protected by the First and Fourth Amendments to the Constitution." (R-361)

The Supreme Court of Alabama did not act on these constitutional rights. At this stage of the proceedings, the case had gone forward for twelve months.

On July 23, 1991, petitioner amended his objection on the ground that he was prejudiced by the defendant failure to give notice that oral testimony would be adduced from his former attornity; that he was totally and completely surprised at the trial; and because he was not given notice of a full trial, he was not prepared. That the attorney for the defendant had been served with a copy of the settlement agreement attached to plaintiff's Motion To Place Into Issue Defen-

dant's Bad Faith (R-437) filed February 15, 1991. And on the ground that petitioner needed a witness to give testimony in opposition to the defendant's claims; that he was prejudiced by Attorney Ralph D. Gaines, III (sic) trying the case and that the trial court relied upon a copy of the settlement agreement rather than the original as required under the rule of evidence, citing Federal Rule of Evidence, Rule 901(a).

On August 13, 1991, the trial court entered an order enforcing the settlement agreement. It did not act on the petitioner's constitutional questions raised through his objections. At this stage of the proceedings, the case had gone forward for one year and two months since the settlement agreement was signed and rejected.

On September 6, and again on September 11, 1991, petitioner filed motions for a new trial arguing that under provisions of Rule 5, A.R.C.P. petitioner should have been given notice that a full trial was to be conducted and that his former attorney would be subpoenaed to testify against

he. And that the Honorable William Sullivan's testimony was needed to controvert claims of the defendant. On October 13, 1991, the trial court heard petitioner's motion. The Honorable William Sullivan testified that he did not recall petitioner having come to him and rejected the settlement agreement; nor did he recall that he would continue the case to jury trial. The record show that Judge Sullivan did not enter an order dismissing the case (Court Reporter's Transcript, CRT- R-66) And that if a settlement agreement had been reached, it would have terminated the case. (CRT-R-65)

Petitioner testified that since there was no record of the settlement agreement, it was unenforceable under Bowman vs. Integrity Credit Corp., 507 So.2d 104.

Defendant also testified that a copy of the settlement ageement was served upon he attached to the Motion To Place Into Issue Defendant's Bad Faith. (CRT-R-37)

The trial court overruled petitioner's mot-

ion for a new trial, entering it on the case action summary sheet.

On December 9, 1991, petitioner served notice of appeal to the Supreme Court of Alabama. Susan B. Dunn, party plaintiff and wife of petitioner did not join in the appeal. On March 16, 1992, petitioner filed his brief, arguing that the trial court erred in enforcing the settlement agreement as Section 34-3-21, Code of Alabama(1975) did not invest in his former attorney authority to bind he to a settlement that was unfair, unjust and one which did not cover his out-of pocket expenses nor pay he for pain and suffering. That since the defendant filed several Rule 12(b) motions, that he was required to file an affirmative defense estopple this case from going forward under Rule 12(g) A.R.C.P. That because he did not object or file an affirmative defense estopple this case from going forward, he waived any right to enforcement. Petitioner further argued that he did not get a fair trial and that the judge was prejudice toward he by allowing three

different attorneys to come before the court and represent the defendant; that he had entered an order the same day it was motioned for; that he had refused to hear seven of petitioner's motions; and he had told the petitioner to get himself a lawyer in open court, causing great laughter among the white attorneys. The manner in which the petitioner raised the federal question was as follows:

> "These rights were so important that to deny them constituted abridgement of substantive rights under the Seventh Amendment to the U.S. Constitution." (p.50)
>
> "This case should be remanded on the ground that Dunn's legal rights were abrused which in the main abridged Dunn's substantive due process under...the Seventh Amendment to the U.S. Constitution." (p. 53)
>
> (See Brief For The Appellant, filed March 16, 1992)

On March 31, 1992, this case was ordered moved to the Alabama Court of Civil Appeals.

On March 30, 1992, defendant/respondent filed her brief, averring that while petitioner's statement of the facts was extensive, she did not disagree with most of them. Defendant/respondent did not correct any of the facts relative to this case, arguing that Rule 47, A.R.A.P. was dispositive of the issues regarding the enforcement of a settlement agreement. Petitioner, in his reply brief denied that this was the issue, averring that his legal rights, due process-procedural, statutorial and constitutional-rights were at issue, invoking the protection of the Fourteenth Amendment, to wit:

> "Avers that when an attorney at law willfully and intentionally withhold physical evidence for the purpose of keeping the judgment low violated Dunn's Fourteenth Amendment rights." (p. 14)

(See Reply Brief, filed April 13, 1992)

On April 24, 1992, the Alabama Court of Civil Appeals entered its opinion, revering and remanding this case to the trial court with instr-

uctions. Holding that the trial court erred in enforcing the settlement as it did not satisfy the law under Rule 47, A.R.A.P.: (1) the agreement was not reduced to a court order, dismissing the case; (2) there were no indices of it being announced in open court; and (3) the minutes of the court contained no record of it. It further found that the agreement was not signed by the parties to be bound thereby, i.e., Susan B. Dunn and a representative of the estate of Leila P. Dunn. The opinion also found that the case action summary sheet contained an entry of "proposed settlement agreement." It therefore found that the settlement agreement was only proposed. The opinion did not address petitioner's question of a right to a jury trial.

On May 7, 1992, respondent made application for rehearing arguing that the opinion ignored prior holding enforcing settlement agreements in accordance with provisions under Rule 47, A.R.A.P. It then requested that the court make several corrections, pursuing to Rule 39(k), A.R.A.P.

Among the facts respondent requested to be corrected were: there was no entry of the settlement agreement on the record; that a clerk in the trial court's office had mistakenly entered on the record "proposed settlement agreement." That it was not attempting to enforce an agreement made in open court, but rather one signed by the party who was to be bound thereby; and included was a certified copy of the case action summary sheet showing that no such entry was made. The Clerk of the Court provided the certified copies.

On May 22, 1992, the Alabama Court of Civil Appeals modified its opinion and overruled the application for rehearing.

On June 5, 1992, respondent made application to the Supreme Court of Alabama for a writ of certiorari, directed to the Alabama Court of Civil Appeals. It argued that a material question of first impression had arisen in the appellate court and that it had been incorrectly decided. The issue was whether the appeals court erred in holding that Rule 47, A.R.A.P. required a settlement

agreement to be signed by both parties or whether it was enforceable and binding on the party who signed it, pursuing to Rule 47, A.R.A.P. and Section 34-3-21, Code of Alabama(1975).

On June 17, 1992, petitioner filed a reply brief in opposition thereto, arguing that the opinion mirrowed opinions of the Supreme Court regarding the enforcement of settlement agreements. Further arguing that since the respondent had chosen the law under Rule 47, A.R.A.P., she was bound by it, to wit: the law required settlement agreement to be made in open court; that it required it to be entered on the record, and that the parties to be bound thereby did not sign it, i.e., Susan B. Dunn and a representative of the estate of Leila P. Dunn. That therefore, the appeals court had correctly decided the case.

On August 21, 1992, the Supreme Court of Alabama granted the writ, per curian. On September 11, 1992, petitioner filed his brief. He had been granted an extension of time in which to do so. He argued that the appeals court's opinion should

affirmed, based on the applicable law of this case, citing Bowman v. Integrity Corp., supra Anonymous v. Anonymous, 353 So.2d. 515, 518 (Ala 1977); and Jones v. Gladney, 339 So.2d 1019 (Ala. 1976). Petitioner further argued that the respondent never filed an objection to the case going forward nor did he file an affirmative defense estopple it either. That because she failed to assert her rights to enforce the agreement, she acquiesence. Finally, petitioner argued that it was not the legislative intent of Section 34-3-21, Code of Alabama(1975) to invest in his former attorney authority to bind he to a settlement agreement which did not cover his out-of-pocket expenses or pay he for his pain and suffering.

By order of the court, the case was submitted on brief.

On November 13, 1992, Pioneer Financial Service, Inc. motioned for leave to file a brief on the side of respondent, as amicus curiae. It argued that it had an interest in the outcome

of this case, showing that there was a conflict in the Alabama courts regarding the enforcement of settlement agreements between the common law under Section 34-3-21, Code of Alabama(1975) and the requirements under Rule 47, A.R.A.P. That Rule 1, A.R.A.P. placed a limitation on the applicability of Rule 47, A.R.A.P. and that therefore, the Alabama Court of Civil Appeals erred in applying Rule 47, A.R.A.P. to the particular facts of this case.

On November 17, 1992, leave was granted.

On November 20, 1992, petitioner motioned the court for leave to file a motion in opposition thereto. The court did not act on petitioner's motion. The motion argued that amicus curiae was not a party to this case and it therefore could not have an interest in it; that the time for filing such a brief had expired; and that the petitioner had not been given notice that the court was actively soliciting briefs. Arguing further that amicus curiae had raised an issue of whieh the respondent had not raised at the

trial court level nor on appeal. That the Supreme Court of Alabama would not consider any matter/issue that was not raised at the court below or passed on by the court of appeals. The court never acted on petitioner's motion.

On November 27, 1992, petitioner filed his reply brief to amicus curiae's brief, arguing that because respondent had failed to raise an issue of Rule 1, A.R.A.P. placing a limitation on the applicability of Rule 47, A.R.A.P., then amicus curiae could not raise it or inject it into the review.

On May 28, 1993, the Supreme Court of Alabama rendered its opinion, holding that Rule 1, A.R.A.P. limited the applicability of Rule 47, A.R.A.P. That Rule 47, A.R.A.P. would only apply to settlement agreements reached at the appellate level, while Section 34-3-21, Code of Alabama(1975) would apply to settlement agreements reached at the trial court level; reversing and remanding this case to the court of civil appeals.

On June 10, 1993, petitioner filed an appli-

cation for rehearing and requesting that pertient facts be included in the opinion, pursuant to Rule 39(k), A.R.A.P. Facts petitioner requested to be added were as follows: (1) that the settlement agreement was signed under duress; (2) that the trial court relied on a copy rather than the original; (3) the trial court never held a hearing on settlement agreement; (4) respondent never filed an objection to the case going forward; (5) respondent did not file a Rule 12(g) A.R.A,P. estopple the case as an affirmative defense; and (5) respondent acquiesence and therefore was not entitled to enforce the agreement.

Petitioner also requested that the court delete that part of its opinion that held that Rule 1, A.R.A.P. placed a limitation on the applicability on Rule 47, A.R.A.P. as the respondent never raised such an issue. That to have so narrowly defined the applicability of Rule 47, A.R.A.P. conflicted with the law under Article I, § 6; Article I, § 13 of the Alabama Constitution(1901) and the Fourteenth Amendment to the

U.S. Constitution.

More specifically, petitioner invoked the protection of the Fourteenth Amendment, to wit:

> "If these rules are to have meaning, Sims was barred from motioning to enforce beyond the time frame. In other words, the Rules of Civil Procedure should have been reviewed by this court pursuant to Article I, § 6, of the Constitution of Alabama, 1901 and the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. This case then did not represent a simple issue of signing a settlement agreement. It represented the denial of procedural due process rights; and the denial of guaranteed rights under Article I, § 6 of the Alabama Constitution and the equal protection clause of the Fourteenth Amendment." (p. 3)
>
> "More importantly, this Court's narrow definition of the applicability of said rule vis-a-vis the statute conflicts with

the law under ...the Fourteenth Amendment of the Constitution." (p.14)

The court did not consider these constitutional questions. It overruled the application on July 23, 1993.

On August 6, 1993, petitioner served notice that he would appeal the court's opinion to the United States Supreme Court.

On August 27, 1993, the Alabama Court of Civil Appeals reversed and remanded this case to the trial court. It entered an opinion in accordance with the opinion of the Supreme Court of Alabama.

On September 8, 1993, the Clerk of the Supreme Court of Alabama served upon petitioner the Certificate of Judgment.

ARGUMENT

Petitioner belives that the law of this case should be shaped by the facts. The Supreme Court of Alabama incorrectly applied the Federal Middle Court's holding under Spurlock v. Pioneer Services, Inc., 808 F.Supp. (M.D.1992) to the facts of this case without deciding petitioner's federal question raised on the merit.

Under Spurlock, supra. the federal court distinquished between the enforceability of a settlement agreement reached at the trial court level and one reached at the appeals level. Concluding that the law under Section 34-3-21, Code of Alabama(1975) governed the enforcement of the former, while the law under Rule 47, A.R.A.P. governed the enforcement while the case is on appeal.

Spurlock, supra. did not address the extraordinary facts this case presented, e.g., whether respondent's failure to file an objection at the trial court level or to plea an affirmative defense estopple this case from going forward wai-

ver any right to enforcement. Waiver is the intentional relinquishment of a known right. American Locomotive Co. V. Gyro Process Co., 185 F.2d 316; Curtis Pub. Co. v. Butts, 87 S.Ct. 1975, 388 U.S. 130, 18 L.Ed.2d 1094.

Spurlock, supra did not provide a remedy at law regarding respondent's failure to serve a motion upon he as provided under Rule 5, A.R.C.P. Neither did it address the right to procedural due process of the trial court refusal to set this motion down for hearing under provisions of Rule 78, A.R.C.P.

The Due Process and Equal Protection Clause of the Fourteenth Amendment guarantee that due process rights of the petitioner will not be denied, abridged or violated in a civil case tried to the court. It requires at a minimum notice and an opportunity to present evidence and witnesses to controvert claims of the respondent. Petitioner was denied this essential guaranteed due process right. Carey v. Piphus, 435 U.S. 247 266, 98 S.CT. 1042, 1053, 55 L.Ed.2d 252 (1978).

Spurlock, supra did not address the fact that the purpose of notice under the due process clause was to apprise petitioner of and to permit he adequate time to prepare for the hearing.

Spurlock, supra did not address the fact that petitioner was totally and completely surprised at the trial (See CRT-29; 47). The fact of this case show that petitioner informed the trial court on more than one occasion that he was not prepared for trial, that he was expecting a hearing, and that he was not expecting respondent to adduce oral testimony from his former attorney (See CRT-29; CRT-47). The Due Process Clause of the Fourteenth Amendment requires a fair trial. In Re Murchison, 75 S.Ct. 623. It requires a fair tribunal. In Re Murchison, supra.

Petitioner was prejudiced by the trial court allowing three different attorneys to represent the defendant-Attorneys Charles P. Gaines, Ralph D. Gaines and Ralph D. Gaines, III (sic). The Fourteenth Amendment was ordained to secure equal rights to all persons whether they are pro se,

or represented by a cadre of well-paid attorneys. The Fourteenth Amendment insures to all persons, the enjoyment of such rights. Ex parte Com. of Va., 100 U.S. 339, 25 L.Ed. 676.; Carey v. Piphus 435 U.S. 247, 266, supra.

The trial court's order of May 8, 1991, permitted respondent to subpoena petitioner's complete personnel files- letters, memos, notes and all other documents (R-281)- without giving the petitioner an opportunity to oppose the motion. The Fourteenth Amendment, under the ambit of the First Amendment, protects the disclosure of priviledged and confidential information. McGhee v. Sipes, 68 S.CT. 836, 334 U.S. 1, 92 L.Ed. 1161. Clearly, Spurlock, supra was inapplicable to the extraordinary, unique facts of this case. A preponderance of the evidence standard should have applied. Rivera v. Minnick, 107 S.CT. 3001 (1978).

The opinion of the Supreme Court of Alabama acknowledged that there is a conflict among the courts regarding the enforcement of a settelemnt

agreement. It cited Wright v. Fountain, 454 So. 2d 520 (Ala. 1984); Anonymous v. Anonymous, 353 So.2d 515 (Ala. 1977); and Bowman v. Integrity Credit Corp., 507 So.2d 104 (Ala.Civ.App. 1987).

The Alabama Court of Civil Appeals applied a preponderance of the evidence standard, to wit: (1) it found that the settlement agreement did not satisfy the law under Bowman, supra, i.e., it was not entered on the record, it was not made in open court and it was not reduced to a court order dismissing the claim. Rudolph v. First S.Fed. Sav. & Loan, 414 So.2d 64 (Ala. 1982).

Petitioner relied on Bowman, supra to the extent there was no entry in the record of the settlement agreement; the trial court held no evidentiary hearing on it; and the trial court did not enter an order dismissing the case on May 28, 1990. Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633-634, 89 L.Ed. 911 (1945). The Court of Civil Appeals relied on Rudolph, supra.

If Section 34-3-21, Code of Alabama(1975) required that the settlement agreement to have

been entered on the record and announced in open court, as this opinion held, then it foreclosed adjudication of due process issues. On the other hand, if Rule 47, A.R.A.P. required enforcement of a settlement agreement to have been signed while the case was at the appellant level, as this opinion held, then it too failed to address the unique and extraordinary facts of this case. Respondent never raised the issue of whether Rule 1, A.R.A.P. limited the applicability of Rule 47, A.R.A.P. Amicus curiae raised the issue. The opinion then was tantamount to amicus curiae's position. The due process of the Fourteenth Amendment prohibited such inclusion. Ex Parte Com. of Va., 100 U.S. 339, 25 L.Ed. 676. It equally protects against adding to the record once the case goes on appeal, regardless or whether the clerk submits a sworn statement attesting to its authenticity. Exxon Corp. v. Eagerton, 103 S.Ct. 2296 at n. 3.

For the Supreme Court of Alabama to have so narrowly delimited the applicability of Rule 47,

A.R.A.P. in juxaposition with Section 34-3-21, Code of Alabama(1975) went beyond the legislative intent of the statute. The purpose of the statute was not to bind petitioner to a settlement agreement that was unfair, unjust or one which did not pay he for his pain and injuries. Senn v. Joseph, 106 Ala. 454 (1894).

It is the general practice in Alabama that an appellate court will not consider issues raised for the first time on appeal. Exxon Corp., supra. at n.3.

The record as a whole shows that petitioner invoked the protection of the Due Process and Equal Protection Clause of the Fourteenth Amendment at an early stage in these proceedings. Yet, this state's highest court failed to act on these federal claims. Therefore, petitioner has exhausted remedy in the state's highest court, without having his federal constitutional claims adjudicated. Street v. New York, 394 U.S. 576, 583, 89 S.Ct. 1354, 1360 22 L.Ed. 572. Without vindication of these important constitutional rights,

petitioner will suffer irreparable harm now and in the future. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed. 2d 66 (1979); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 96 S.Ct. 1917,1924, 48 L.Ed. 2d 450 (1976); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 147-149, 100 S.Ct. 1540, 1543-1544, 64 L.Ed 2d 107 (1980); Heckler v. Mathews, 104 S.Ct. 1387.

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment guaranteed to petitioner equal rights under the law. The Due Process Clause guaranteed to he procedural, statutorial and constitutional due process rights. Upon proper showing of the denial, violation and abridgement of these substantive due process rights guaranteed under the First, Seventh and Fourteenth Amendment to the U. S. Constitution, this Court, as the grantor of these rights, shall so vindicate.

Respectfully submitted,

Willie J. Dunn, pro se
4028 Juanita Circle
Roosevelt City, AL 35020
205/424-1776

CERTIFICATE OF SERVICE

I certify that on 10/1/93 I served three (3) copies of this application on Attorney Charles P. Gaines, 127 North Street, Talladega, Alabama 35160 by placing the same in the U.S, Mail with prepaid postage.

Willie J. Dunn, pro se
4028 Juanita Circle
Roosevelt City, AL 35020
205/424-1776

93-617

Supreme Court, U.S.
FILED
OCT - 4 1993
OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIE J. DUNN,

PETITIONER

V.

WILMA D. SIMS,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

APPENDIX

WILLIE J. DUNN
PRO SE
4028 Juanita Circle
Roosevelt City, AL 35020
205/424-1776

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Appendix A

RELEASED

MAY 28 1992

CLERK
SUPREME COURT OF ALABAMA

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1992-93

1911395

Ex Parte Wilma D. Sims

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS

(Re: Willie J. Dunn et al.

v.

Wilma D. Sims)

(Talladega Circuit Court, CV-84-077;
Court of Civil Appeals, 2910348)

MADDOX, JUSTICE.

We granted the writ of certiorari to review the holding by the Court of Civil Appeals that settlement agreements entered into in the trial court are controlled by the provisions of Rule

47, Ala.R.App.P., and that the settlement agreement signed by Willie J. Dunn, the respondent here, and his attorney, was invalid because "[t]he written document was not properly executed, i.e., not signed by the party to be charged, and the record does not contain the necessary indicia of a settlement reached in open court." Dunn v. Sims, [ms. 2910348, April 24, 1992] ___So.2d ___(Ala. Civ. App. 1992). We hold that the Court of Civil Appeals has misapplied the law, and we reverse and remand.

The background facts are recited in the opinion of the Court of Civil Appeals and need not be repeated her. However, we briefly set out the facts that are relevant to an understanding of the legal issue presented. Willie J. Dunn and his mother, Leila Dunn, filed a negligence action against Wilma D. Sims; that action arose out of an automobile accident. Leila Dunn later died from unrelated causes. Willie J. Dunn's attorneys negotitated a proposed settlement agreement with Sims's attorney. Dunn's attorneys reduced the

agreement to writing, and Dunn and his attorneys signed it. The trial court subsequently enforced the written settlement agreement, and Dunn appealed to the Court of Civil Appeals. Notwithstanding the fact that the settlement agreement was entered into in the trial court, the Court of Civil Appeals applied the provisions of Rule 47, Ala.R.App.P., and concluded that the requirements of a valid settlement agreement had not been met, and the court reversed the judgment.

There may be some confusion among the bench and bar regarding whether Rule 47, Ala.R.App.P., applies to settlement agreements reached at the trial level. We take this opportunity to hormonize the cases and guide to the bench and bar in future cases.[1]

---

[1]Pioneer Financial Services, Inc., has filed an amicus curiae brief in this case asking us to hold that Rule 47, A.R. App.P., applies to agreements reached in cases on appeal and that the provisions of Ala. Code 1975 § 34-3-21, apply to agreements reached in cases in the trial court.

Rule 47, Ala.R.App.P., provides:

> "No private agreement or consent between the parties or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby; provided, however, agreements made in open court or at pretrial conference are binding, whether such agreements are oral or written."

This Court and the court of Civil Appeals have not applied Rule 47 consistently. See, e.g., Wright v. Fountain, 454 So. 2d 520 (Ala. 1984); Anonymous v. Anonymous, 353 So. 2d 515 (Ala. 1977); Bowman v. Integrity Credit Corp., 507 So.2d 104 (Ala.Civ.App. 1987). Neither this Court nor the Court of Civil Appeals, insofar as we cam ascertain, has discussed or applied Rule 47 in light of Rule 1, Ala.R.App.P., which specifically provides that the Rules of Appellate Procedure apply only to cases on appeal. Moreover, as noted by the Honorable Ira DeMent, United States district judge, in Spurlock v. Pioneer Financial Services, Inc., 808 F.Supp. 782 (M.D. Ala. 1992), this Court has, on several occasions, reviewed the validity of settlement agreements reached in the trial

court and has on those occasions applied the provisions of Ala. Code 1975, § 34-3-21, without mentioning Rule 47. See Spurlock, 808 F.Supp. at 783, citing Beverly v. Chandler, 564 So. 2d 922, 923 (Ala. 1990); King v. Travelers Ins. Co., 513 So. 2d 1023, 1026 (Ala. 1987); Reeves v. Orkin Extermination Co., 457 So. 2d 402, 404 (Ala. 1984).

Section 34-3-21 provides: "An attorney has authority to bind his client in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court." In Spurlock, Judge DeMent refused to follow the reasoning of the Court of Civil Appeals in this case, and held instead that "it would seem that Rule 47 would govern settlement agreements reached while the matter is on appeal, while section 34-3-21 would govern settlement agreements reached while the case is still at the trial level." 808 F.Supp. at 783. We agree with that interpretation.

The settlement agreement in this case meets the requirements of § 34-3-21 and is due to be

enforced. Consequently, the judgment of the Court of Civil Appeals is due to be reversed and the cause remanded with instructions to enter an appropriate order.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Huston, Kennedy, and Ingram, JJ., concur. Shores and Adams, JJ., concur in result.

Appendix B

APR 24 1992

STATE OF ALABAMA- - -JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1991-92

2910348

Willie J. Dunn, et al.

v.

Wilma D. Sims

Appeal from Talladega Circuit Court

(CV-84-077)

BRADLET, Retired Appellate Judge

In 1984 Willie J. Dunn and his mother, Leila Dunn, filed a negligence action against Wilma D. Sims for damages arising from a car accident

between the parties. Dunn initially engaged Paul Phillips to represent him in the matter, and Phillips subsequently "farmed" the case out to another attorney, Greg Wood. In 1988 Leila Dunn died from causes unrelated to the accident.

In May 1990 Wood negotiated a proposed settlement agreement with Sims's attorney, providing that Sims would pay $6,200 damages to Dunn and $300 to his mother's estate. The case was set for trial on May 27. On May 25 the proposed settlement agreement was reduced to writing and signed by Dunn and his attorneys. On May 27 Dunn's attorney appeared before the trial court to present the proposed agreement and the trial date was apparently canceled. Dunn himself went before the court later that same day and vigorously refused to be bound by the agreement.

Shortly thereafter, both Wood and Phillips filed motions to withdraw as Dunn's counsel and filed attorney's liens to collect the fees due to them under the proposed settlement agreement. The motions were granted. Acting pro se, Dunn

continued to litigate the case and Sims continued her defense, with both parties filing various motions and proceeding with discovery. However, after one year, Sim's attorney filed a motion to enforce the proposed settelement and Dunn filed motions in opposition. Following an ore tenus proceeding, the trial court entered an order enforcing the written agreement. Dunn's post-judgment motions were denied and he appeals.

The dispositive issue before us is whether the trial court erred in enforcing the settlement agreement drawn up by Dunn's attorney.

Rule 47, Alabama Rules of Appellate Procedure, provides as follows:

> "No private agreement or consent between parties or their attorneys, relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby; provided, however, whether such agreement are oral or written."

In this case the signature requirement of Rule 47 has not been met. The settlement document was drafted by Dunn's attorneys, and signed only

by them and Dunn. The record shows that more than a year passed before Sims's attorney even knew that the agreement had been reduced to writing. Accordingly, the settlement cannot be valid under Rule 47 unless it was properly made in open court or pretrial conference.

For purposes of the rule, "open court" means a proceeding where there are formal entries made, if only in minutes or bench notes, to record the critical litigation events and thus have available a transcript that is beyond dispute. Bowman v. Integrity Credit Corp., 507 So. 2d 104 (Ala. Civ. App. 1987). When there is no record of the alleged agreement in the reporter's transcript, nor on the docket sheet, nor in the minute entry or judgment entry, the agreement does not fall within the requirements of Rule 47. Bowman. Moreover, an agreement of the parties that is not reduced to a court order does not constitute an adjudication of a pending claim. Rudolph v. First S. Fed. Sav. & Loan, 414 So. 2d 64 (Ala. 1982).

In this case Greg Wood testified that he

went into open court on May 27, informed the trial court that Dunn's case had been settled on May 25, and thereby canceled the trial date that was scheduled. However, there is no transcript of this appearance, and the record does not show whether Sims's attorney was present. The case action summary sheet contains only the following entry; "5-25-90: proposed settlement agreement." There is no notation elsewhere in the record concerning an appearance by either Wood or Dunn in regards to the settlement, nor is there any further mention of the agreement itself. The trial court never entered an order ratifying the settlement or dismissing the case, and the record contains no bench notes or other evidence to show that the court intended to do so.

The court subsequently granted the motions of Dunn's attorneys to withdraw from the case and to attach attorneys' liens to collect their fees. However, the court made the liens "contingent upon the outcome of the case being favorable to the Plaintiff." Obviously, the outcome of

a settled case is not in question; thus, the language of the court's order clearly indicates that the case was still pending at that time. The court granted Dunn's motion to act in his own behalf, then continued to hear and rule upon various motions filed in the case by both Dunn and Sims's attorney for an entire year after the aettlement agreement was allegedly made in open court.

After reviewing the record in full, we must conclude that the requirements of a valid settlement agreement were not met in this case. The written document was not properly excuted, i.e. not signed by the party to be charged, and the record does not contain the necessary indicia of a settlement reached in open court. As noted on the case action summary sheet, the agreement was never more than a proposed settlement; thus, under Rule 47 it cannot be "alleged or suggested" by either party against the other. Accordingly, we hold that the trial court erred in granting Sims's motion to enforce the written agreement. The court's judgment is reversed and the cause

remanded for further proceedings.

The foregoing opinion was prepared by Retired Appellate Judge Robert P. Bradley while serving on active duty status as a judge of this court under provisions of § 12-18-10(e), Code 1975, and this opinion is adopted as that of the court.

REVERSED AND REMANDED WITH INSTRUCTIONS.

All the judges concur

Appendix C

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

WILLIE J. DUNN, et al. *

Plaintiff, *

VS. * CIVIL ACTION NO.

WILMA D. SIMS, * CV 84-77

Defendant. *

ORDER

This matter cam before the court on the 30th day of July, 1991 upon the defendant's motion to enforce a settlement agreement between the parties. The court heard the testimony of Willie J. Dunn who is a plaintiff individually and plain-

tiff in his capacity as administrator of the Estate of Lela P. Dunn, deceased. The court also heard testimony of B. Greg Wood, an attorney at law who represented the plaintiff until his withdrawal in June of 1990. The court further heard testimony of Ralph D. Gaines, III who represented the defendant at said hearing. The remaining plaintiff, Susan Dunn was not present nor has she opposed the defendant's motion

Upon consideration of the testimony, evidence and argument presented in open court as well as established case law and authority pertaining to this matter, the court finds that an enforceable agreement for settlement of this action was reached between the parties. In reaching its decision the court makes the following findings of facts:

1. The plaintiffs were represented by an attorney who had authority to bind his clients by entering into an agreement for settlement of this action. Both Mr. Dunn and Mr. Wood testified a settlement of this action was negotiated and agreed upon between the attorneys for the parties

on May 25, 1990.

2. Mr Dunn was kept informed of settlement negotiations. The testimony revealed Mr. Dunn was in the immediate presence and hearing of his attorney, B. Greg Wood, while Mr. Wood was negotiating by telephone with the attorney for the defendant. The testimony further confirmed Mr. Dunn was kept fully informed as to the progress of the negotiations and the terms of settlement negotiated.

3. An agreement for settlement of this action in its entirety was reached between the attorneys for the parties.

4. The plaintiffs were fully aware of the terms of the settlement which was reduced to writing and reflected in that document entitled "Settlement Agreement" which was executed by Willie J. Dunn individually and as administrator of the Estate of Lela P. Dunn.

5. The plaintiffs authorized their attornay to enter into an agreement to settle this action on May 25, advised the court the case had been

settled thereby precluding the necessity for a trial which was scheduled for May 28.

6. The attorney for the plaintiffs did in fact advise the court the case had been settled.

Upon consideration of the foregoing, the court is of the opinion the settlement agreement reached between the parties is due to be enforced pursuant to the terms as set forth in the settlement agreement dated May 25, 1990. It is therefore

ORDERED, ADJUDGED AND DECREED that the defendant pay to the Circuit Clerk of Talladega County the sum of Six Thousand Two Hundred and No/100 ($6,200.00) Dollars for settlement of the claims of Willie J. Dunn and Susan Dunn and the sum of Three Hundred and No/100 ($300.00) Dollars for settlement of the claims of the estate of Lela P. Dunn.

The clerk of this court is hereby directed not to distribute proceeds from the settlement until further direction from the court. Costs to be assessed against the defendant.

Done this 13th day of August, 1991.

Circuit Court Judge

Appendix D

IN THE CIRCUIT COURT FOR TALLADEGA COUNTY, ALABAMA

WILLIE J. DUNN, ETAL, *

PLAINTIFFS *

VS. * CIVIL ACTION NUMBER:

WILMA SIMS, ETAL, * CV 84 077

DEFENDANTS *

JUDGMENT

This matter coming on for hearing on the Motion for Attorney's Lien filed by B. Greg Wood, and the Motion for Attorney's Lien filed by Paul A. Phillips, former attorneys for the plaintiffs in this matter, on September 20, 1990, and the Court having considered the arguments of said movants, and Willie J. Dunn, Plainitff, **IT IS THE JUDGMENT OF THE COURT** that said motions for attorney's liens are due to be granted as herein provided.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That the former attorneys for the Plaintiffs in this case, B. Greg Wood and Paul A. Phillips, shall have a lien upon any monies recovered by Plaintiffs or either of them in this action, in the total amount of One Thousand, Nine Hundred Fifty and No/100 ($1,950.00) Dollars; that the right of attorneys to recover under this lien shall be contingent upon the outcome of the case being favorable to Plaintiffs or either of them. The lien herein established is in lieu of any reimbursement to said attorneys for expenses, Court costs or other charges which might be otherwise due said attorneys from the Plaintiffs.

DONE and **ORDERED** this 19 day of November, 1990.

_____

CIRCUIT JUDGE

Appendix E

SPURLOCK v.PIONEER FINANCIAL SERVICES, INC.,
Cite as 808 F.Supp. 782 (M.D.Ala.1992)

Bobby **SPURLOCK**, Plaintiff,

v.

PIONEER FINANCIAL SERVICES, INC. et al., defendants.

Civ. A. No. 90-D-840-N

United States District Court,

M.D. Alabama, N.D.

Oct. 28, 1992.

Fraudulent inducement claim was brought, and settlement agreement was reached. The United States Magistrate Judge Coody, recommended denial of motion to enforce settlement agreement since it was not signed. The District Court, DeMent, J. held that agreement was governed by Alabama statute that does not require settlement agreement to be signed, rather than Alabama rule of appellate procedure requiring settlement agreement to be signed by party to be bound.

Motion granted.

1. **Compromise and Settlement** 5(1)

Alabama statute does not require settlement agreement to be signed, rather than Alabama rule of appellate procedure requiring settlement agreement to be signed by party to be bound governed settlement agreement entered into before case was appealed. Ala. Code 1975, § 34-3-21; Ala. Rules App. Proc., Rules 1, 47.

2. **Federal Courts** 384

It is permissible for federal court to reject reasoning of state appellate court decision where decision appears to be contradictory to that court's other decisions.

ORDER

De Ment, District Judge

Now before the court is the recommendation of the Magistrate Judge, entered on July 20, 1992. Respondents filed objections to the Magistrate's Recommendation on July 20, 1992. Upon an independent evaluation of this matter, the court adopts

the Magistrate's reasoning and conclusions as to the plaintiff's fraudulent inducement claim. However, the court declines to adopt the Magistrate's reasoning or conclusion as related to the defendants' motion to enforce the settlement agreement. For the following reasons, the court determines that the defendants' motion to enforce the settlement agreement is due to be granted and the settlement is due to be enforced.

BACKGROUND

On May 22, 1991, Magistrate Judge Coody entered a recommendation that the defendants' motion to enforce the settlement agreement should be denied. In the recommendation, he relied on Rule 47 of the Alabama Rules of Appellate Procedure. The defendants objected to this recommendation.

In an order dated August 28, 1991, District Judge Thompson declined to accept the recommendation. He reasoned that section 34-3-21 of the Alabama Code should govern the enforcement of settlement agreement reached prior to trial. Instead of overruling the recommendation, Judge

Thompson referred the matter back to Judge Coody for "further appropriate proceedings" consistent with the order.

On July 20, 1992, Judge Coody issued a second recommendation. Again, he found that Rule 47 of the Alabama Rules of Appellate Procedure was the controlling statute, relying this time upon cases which were handed down by the Alabama Court of Civil Appeals after Judge Thompson's order. Again, the defendants have filed objections to the recommendation.

DISCUSSION

[1] As correctly stated by the Magistrate Judge, because this is a diversity case, Alabama law controls the construction and effect of the settlement agreement. Rule 47 of the Alabama Rules of Appellate Procedure requires that a settlement agreement be in writing and "signed by the party bound thereby."[1] In contrast, section

---

1. Appellate Rule 47 reads:

No private agreement or consent between

34-3-21 of the Alabama Code does not require a settlement agreement to be signed by the parties.[2]

At first the matter appears deceptively simple. Rule 1 of the Alabama Rules of Appellate Procedure states that "[t]hese rules govern appeals to the supreme Court, the Court of Civil Appeals and the Court of Criminal Appeals, and the proceedings on petitions for writ or other relief which these judges are empowered to grant."

---

the parties or their attorneys relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing and signed by the party to be bound thereby; provided, however, that agreements made in open court or at pretrial conference are binding, whether such agreements are oral or written.

2. Section 34-3-21 states that "an attorney has authority to bind his client, in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court." The Alabama Supreme Court has several times enforced a settlement agreement against a party when the agreement was entered into by the party's attorney and was not signed by the party. See e.g. Beverly v. Chandler, 564 So. 2d 922, 923 (Ala. 1990)

On the other hand, section 34-3-21 states that it governs settlement agreements "in any action of proceeding." Thus it would seem that Rule 47 would govern settlement agreements reached while the matter is on appeal, while section 34-3-21 would govern settlement agreements reached while the case is still at the trial level.

In general, this appears to be the practice. There are several cases in which the Alabama Supreme Court reviewed the finding of a settlement agreement's validity, referring solely to section 34-3-21, without any mention of Rule 47. See, e.g., Beverly v. Chandler, 564 So.2d 922, 923 (Ala. 1990); King v. Traveler Ins. Co., 513 So.2d 1023, 1026 (Ala. 1987); Reeves v. Orkin Exterminating Co., 457 So.2d 402, 404 (Ala. 1984). In at least one case where the settlement agreement was reached while the case was on appeal, the appellate court applied Rule 47 to review the settlement's validity. See, e.g., Bush v. Evans, 598 So.2d 952, 953 (Ala. Civ.App. 1992). The one case which mentions both

statutes, Phillips v. Knight, 559 So.2d 564 (Ala. 1990), does not resolve the arguable conflict between the appellate rule and the statute. In Phillips there was no written agreement, either signed or unsigned, so the oral agreement would have been invalid under either rule.[3]

---

3. If six words were added to the appellate rule, it would be compatible with section 34-3-21, viz:

> No private agreement or consent between the parties or their attorneys relating to the proceedings in any cause, shall be alleged or suggested by either the other, [while said cause is on appeal] unless the same be in writing and signed by the party to be bound thereby; provided,however that agreements made in open court or at pretrial conferences are binding whether such agreements are oral or written.

Because Appellate Rule 1 specifically limits the application of the appellate rules to matters which are on appeal, the court believes that the reading suggested above is the one which comports best with language of the appellate rules and with the standard procedure among lawyers and courts.

The "agreements made in open court or at pretrial conferences," which need not be written refer to agreements made on the record in the court below (whether

The Magistrate Judge cites a recent case, Dunn v. Sims, No. 2910348, 1992 WL 80778, 1992 Ala.Civ.App. LEXIS 191 (Ala.Civ.App. April 24, 1992) (writ of certiorari granted on August 25, 1992) for the proposition that Rule 47 can control cases which are not on appeal. The Dunn court, without referring to section 34-3-21 or referring to any judicial precedent, held a settlement agreement invalid because it had not been signed by both parties,[4]

---

taken by a court reporter or noted by the trial judge on his or her docket sheet), before the appellate court itself (if this has ever happened) or at a pretrial conference where the court might have entered the fact or terms of a settlement on the agreed to or proposed pretrial order.

4. In Dunn, plaintiff's counsel negotiated a proposed settlement agreement with the defendant's attorney. The agreement was later reduced to writing by the plaintiff's attorney, evidently without consulting the defendant's lawyer. The document was signed by plaintiff Willie Dunn and his attorneys. Three days later, Dunn himself went before the trial court and repudiated the agreement. Both parties then proceeded with discovery and continued to file motions. After a year had passed the defendant filed a motion to enforce

[2] With the greastest deference to the Alabama Court of Civil Appeals and in particular deference to the learned judge who wrote the opinion in Dunn, the court doest not believe that Dunn is a correct statement of Alabama law. While the applicability of the statute and the appellate rule is not settled, given the plain meaning of the appellate rules and of the statute and given the holdings of several cases decided by the state's highest court, it appears that section 34-3-21 controls the making of settlement agreements which are entered into before the case is appealed.[5] Because the

---

the settlement. The court granted the motion. Id. 1992 WL 80778 at *1, 1992 Ala. Civ. App. LEXIS 191 at *1.

On appeal, the Dunn court, without mentioning section 34-3-21, held the settlement agreement invalid because it was not signed in accordance with Ruel 47. In so ruling, the appellate court seemed to find compelling the fact that the defendant did not know that the proposed settlement agreement had been reduced to writing. Id. 1992 WL 80778 at *1-2, 1992 Ala. Civ.LEXIS 191 at *2.

5. Although it may be unusual, it is permissible for a federal judge to reject the reasoning of a state appellate court

parties complied with the requirements of section 34-3-21, the court finds that the settlement agreement entered into is a valid agreement and is enforceable.

Accordingly, it is **CONSIDERED** and **ORDERED** that the defendants' motion be and the same is hereby **GRANDED.** The parties are **DIRECTED** to abide by the terms and conditions of the settlement agreement.

Appendix F

Standley **D. BOWMAN,** a/k/a & d/b/a
Bowman Accounting

v.

INTEGRITY CREDIT CORP, f/k/a
Tri-Continental Leasing

Civ. 5713

Court of Civil Appeals of Alabama

April 1, 1987

---

decision where that decision appears to be contradictory to that court's other decisions. See, e.g., Fondren v. Allstate Ins. Co., 790 F.2d 1533, 1535 n.4 (11th Cir.1986) (rejecting the reasoning of an Alabama Supreme Court case where it "flatly contradicts" other cases and where it "flatly contradicts" other cases and where it "does not appear to be a correct statement of

Credit company brought action against accountant for recovery under lease agreement. The Circuit Court, Baldwin County, Charles C. Partin, L., entered order granting credit company's motion to enforce oral settlement agreement and subsequently entered order amending prior judgment to include dismissal with prejudice of all counterclaims, and accountant appealed. Credit company moved to dismiss appeal as untimely. The Court of Civil Appeals L. Charles Wright, Retired Appellate Judge, held that: (1) judgment granting credit company judgment without mentioning counterclaims was not final judgment for purposes of appeal, and (2) motion averring that settlement agreement between counsel had been reached and that court had been informed of such agreement did not satisfy rule requiring that oral agreements be made in open court or at pretrial conference.

Alabama law").

Reversed and remanded.

1. **Appeal and error 80(6)**

Entry of judgment awarding money to plaintiff, thereby enforcing oral settlement agreement, without mentioning defendant's counterclaims, was not final judgment for purposes of appeal, absent express judicial determination that such judgment was final. Rules Civ. Proc., Rule 54.

2. **Judgment 194, 233**

Judgment against less than all parties or upon less than all claims does not terminate action as to any parties or claims. Rules Civ. Proc., Rule 54.

3. **Compromise and Settlement 5(3)**

Rule that oral agreement between parties or their attorneys be made in open court or at pretrial conference requires acknowledgment of such agreement in judgment entry. Rules App. Proc., Rule 47.

4. **Compromise and Settlement 5(3)**

Motion averring that settlement agreement had been reached between counsel and that court was

informed of such agreement did not satisfy rule requiring that oral agreement be made in open court or at pretrial conference, absent formal record entry of such agreement, particularly where motion conceded that counsel for nonmoving party indicated that he wanted his client to execute written stipulation of consent to judgment to be filed for record. Rules App. Proc., Rule 47.

5. **Judgment** 88

In entering judgment upon receipt of notices of settlement given by phone, court should make minute entry or note in judgment as to how judgment came about. Rules App. Proc., Rule 47.

Stanley D. Bowman, pro se.

Russell S. Terry and Eric J. Breithaupt of Feibelman, Shulman and Terry, Mobile, for appellee.

L. CHARLES WRIGHT, Retired Appellate Judge.

Integrity Credit Corporation (plaintiff) brought suit against Bowman (defendant) for recovery under a lease agreement in 1983. After pleadings, discovery, and counterclaim, the case was set for trial in the Circuit Court of Baldwin

County, Alabama, on October 21, 1986. On October 17, oral agreement was reached between counsel for settlement and entry of judgment in favor of plaintiff for a specific sum. On the date set for trial, plaintiff filed a motion to enforce the oral agreement by entry of judgment. The motion averred that a settlement agreement between counsel had been reached on October 17, 1986, and the court informed of the agreement; that counsel for defendant indicated that he wanted his client to execute a written consent in court for the record; that plaintiff, relying on the oral agreement, had excused his witness from appearing at trial and was, thus, unable to proceed with trial; plaintiff, therefore, asked the court to enforce the oral agreement.

On October 23, 1986, the court entered on its case action summary sheet the following:

> "Motion to enforce settlement agreement granted. Judgment entered in favor of plaintiff and against defendant in the sum of $5,7500 [sic] plus cost of court."

On November 4, 1986, the trial court filed the

following order:

> "Plaintiff having filed a 'Motion to Enforce Settlement Agreement' in this matter moving the Court to enter judgment against Defendant, **STANLEY DWIGHT BOWMAN**, and in favor of Plaintiff, **INTEGRITY CREDIT CORPORATION**, for the sum of $5,750.00, and dismissing said Defendant's counterclaim against Plaintiff,with prejudice; and counsel for both parties having had ample opportunity to offer arguments with respect to said motion by telephone conference call on Friday, October 17, 1986; and the Court having duly considered Plaintiff's said motion and having entered an order on October 23, 1986, granting said motion and entering judgment in favor of Plaintiff and against Defendant in the sum of $5,750.00 plus costs of court but otherwise not addressing Defendant's counterclaims against Plaintiff;
>
> "it is hereby **ORDERED, ADJUDGED** and **DECEED** that said order and entry of judgment of October 23, 1986, is hereby amended to include the dismissal, with prejudice, of each and every counterclaim filed in this action by Defendant, **STANLEY DWIGHT BOWMAN**, against Plainitff, **INTEGRITY CREDIT CORPORATION.**
>
> "Dated on this, the 4th day of Novenber, 1986.
>
> "/s/ Charles C. Parin
> **"CHARLES C. PARTIN**
> **"CIRCUIT JUDGE"**

On December 9, 1986, defendant, acting pro se, filed a notice of appeal from the judgment of October 23, 1986. Defendant appears before this court pro se, presenting the issue of whether an

oral agreement between opposing attorneys for entry of judgment not made in open court is binding and may be enforced by the court. Before addressing the merits of the issue, the court will dispose of the motion of plaintiff to dismiss the appeal as untimely.

Motion to Dismiss Appeal

[1,2] We have previously noted that the initial entry of judgment was on October 23, 1986. That entry gave judgment for money to plaintiff but made no mention of defendant's counterclaim. Thus, the first judgment falls within the provisions of Rule 54, A.R.Civ.P. Rule 54 provides that a judgment which fails to dispose of all claims presented in the action, including counterclaims, is not final for purposes of appeal unless expressly determinated to be so by the court. Goza v. Everett, 365 So.2d 257 (Ala.1978); Wesley v. Brandon, 419 So.2d 257 (Ala.Civ.App.1982). No such express determination was entered in this case. A judgment of less than all the parties or upon all the claims does not terminate the action as to any of the parties

or claims. The judgment thus entered is subject to revision or correction at any time prior to the entry of a judgment which does terminate all claims or rights of the parties. Hallman v. Marion Corp., 411 So.2d 130 (Ala.1982). Therefore, the final judgment was not entered until November 4, 1986. We consider the notice of appeal, although directed to the entry of October 23, 1986, to have been timely filed on December 9, 1986. The motion to dismiss the appeal is denied.

On the Issue

[3] There is no record of evidence in this case. The only record of events is that of the clerk, including the motion to enforce the oral agreement and the judgment entries of the court. THe statement of events contained in the motion to enforce is not sworn. The judgment of November 4, 1986, contains a statement as previously quoted herein, that indicates that counsel for both parties had "opportunity to offer arguments

with respect to said motion by telephone conference call on Friday, October 17, 1986." However, the record indicates that the motion to enforce settlement referred to in the order was not final until October 21, 1986. The motion itself states that the agreement was made on October 17, Therefore, obviously there is conflict in the record as to the occurrence of events relating to the alleged settlement agreement upon which the judgment is founded.

It had long been the law of Alabama that private agreements between parties or their attorneys must be in writing and signed by the party to be bound thereby. Former Supreme Court Rule 20. The rule was extended by the courts to include the use of oral agreements made in open court or at pretrial conference. Crawford v. Tucker, 258 Ala. 658, 64 So.2d 411 (1953); Preswood v. Watson, 111 Ala. 604, 20 So. 600 (1895). Present Rules of Appellate Procedure Rule 47 includes these extensions. Jones v. Gladney, 339 So.2d 1019 (Ala.1976); Anonymous v. Anonymous, 353 So.2d 515 (Ala.1977). Al-

though Rule 47, A.R.A.P., adopted the extension providing for oral agreements, it remains necessary that such agreement be made in open court. Anonymous, supra, at 518.

The esteemed Mr. Justice Bloodworth, writing for the Court in Anonymous adopted the explanation of the term "open court" stated by the New York court in the case of In re Dolgin Eldert Corporation, 31 N.Y.2d 1, 334 N.Y.S.2d 833, at 840, 286 N.E.2d 228, at 233. Stated succinctly, "open court" means a proceeding where there are formal entries made, if only in minutes or bench notes, to record the critical litigation events, so that transcript beyond dispute and fallibility of memory is available. The court concluded in Anonymous that in a case where there is no record of the alleged agreement in the reporter's transcript, nor on the docket sheet, nor in the minute entry, the agreement does not fall within the rule. We might add the additional condition that where there is no acknowledgement of such an agreement in the judgment entry, the requirement of the rule is

not satisfied.

[4] In this case, none of the conditions of an "open court" agreement are disclosed. Whether there was ever an agreement for settlement in any form is contained only in a nonevidentiary pleading. Even the allegations of that pleading do not satisfy the conditions of an "open court" proceeding. We are not prepared in this case to decide whether notice by counsel via telephone meets the criteria of an "open court" proceeding. The court is bound by the record in all cases. There is nothing in the record to satisfy the requirements of a binding agreement under Rule 47, A.R.A.P., which could be enforced by judgment. To the contrary, plaintiff's motion to enforce the agreement concedes that though agreement between counsel had been reached, counsel for defendant indicated that he wanted his client to execute a written stipulation of consent to judgment to be filed for the record. The record discloses no such stipulation. Had such stipulation been executed and filed, then Rule 47 would have been satisfied and the agreement binding. If

the stated desire of counsel to secure a written stipulation from defendant is accepted, such fact raises the additional question of whether the agreement was conditional upon the filing of such stipulation.

[5] This court is of the opinion that the judgment entered was based upon a nonbinding agreement of counsel and must be set aside. We recognize that in practice many notices of settlement are given by phone and judgment entered thereon without problem. However, it would be advisable for the court to make minute entry or note in the judgment how it came about.

The foregoing opinion was prepared by Retired Appellate Judge **L. CHARLES WRIGHT** while serving on active status as a judge of the court under provisions of § 12-18-10(e), Code 1975, and is hereby adopted as that of the court.

REVERSED AND REMANDED.

All the Judges concur.

Appendix G

IN THE SUPREME COURT OF ALABAMA

July 23, 1993

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims). (29103 48) (Talladega: CV-84-077)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

MADDOX, J. - Hornsby, CJ., Shores, Houston and Kennedy, JJ., concur

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23 day of July, 1993.

Robert G. Esdale

Clerk, Supreme Court of Alabama

Appendix H

OFFICE OF

CLERK OF THE COURT OF CIVIL APPEALS

STATE OF ALABAMA

Re: CIV. 2910348 May 22, 1992

Willie J. Dunn, et al. vs. Wilma D. Sims
Appellant **Appellee**

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

____ Court Reporter granted additional time to file reporter's transcript to and including

____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

____ Appell____ granted 7 additional days to file brief(s) to and including

____ Appellant(s) granted 7 additional days to file reply brief(s) to and including

____ Record on Appeal filed on this date.

____ Appendix Filed on this date.

____ Application for rehearing overruled. No opinion written on rehearing.

____ Permission to file amicus curiae briefs granted.

____ Transferred to the Supreme Court for lack of jurisdiction. A/N

XXX OPINION MODIFIED; APPLICATION FOR REHEARING OVERRULED.

John H. Wilkerson, Jr.
Clerk, Court of Civil
Appeals of Alabama

COURT OF CIVIL APPEALS OF ALABAMA

250 Governors Park Building
2600 E. South Boulevard
Montgomery, Alabama 36116

May 22, 1992

This is to certify that the attached pages 1, 2, & 4 of the opinion in case #2910348, Dunn v. Sims, which was released on April 24, 2992, has been substituted for the original page on Friday, May 22, 1992.

Willie E. Roberson

Robert J. Russell

STATE OF ALABAMA - - -JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS

OCTOBER TERM 1991-92

2910348

Willie J. Dunn, et al.

v.

Wilma D. Sims

Appeal from Talladega Circuit Court

(CV-84-077)

BRADLEY, Retired Appellate Judge

In 1984, Willie J. Dunn and his mother, Leila Dunn, filed a negligence action against Wilma D. Sims for damages arising from a car accident between the parties. Dunn initially engaged Paul Phillips to represent him in the matter, and Phillips subsequently associated another attorney, Greg Wood. In 1988 Leila Dunn died from causes unrelated to the accident.

In May 1990 Wood negotiated a proposed settlement agreement with Sims's attorney, providing that Sims would pay $6,200 damages to Dunn and $300 to his mother's estate. The case was set for trial on May 28. On May 25 the proposed settlement agreement was reduced to writing and signed by Dunn and his attorneys. On May 28 Dunn's attorney appeared before the trial court to present the

proposed agreement and the trial date was apparently canceled. Dunn himself went before the court later that same day and virgorously refused to be bound by the agreement.

Shortly thereafter, both Wood and Phillips filed motions to withdraw as Dunn's counsel and filed attorney's liens to collect the fees due to them under the proposed settlement agreement. The motions were granted. Acting pro se, Dunn continued to litigate the case and Sims continued her defense, with both parties filing various motions and proceeding with discovery. However, after one year, Sims's attorney filed a motion to enforce the proposed settlement and Dunn filed motions in opposition. Following an ore tenus proceeding, the trial court entered an order enforcing the

only in minutes or bench notes, to record the critical litigation events and thus have available a transcript that is beyond dispute. Bowman v. Integrity Credit Corp., 507 So.2d 104 (Ala.Civ.App.

1987). When there is no record of the alleged agreement in the reporter's transcript, nor on the docket sheet, nor in the minutes entry or judgment entry, the agreement does not fall within the requirements of Rule 47. Bowman. Moreover, an agreement of the parties that is not reduced to a court order does not constitute an adjudication of a pending claim. Rudolph v. First S. Fed. Sav. & Loan, 414 So.2d 64 (Ala. 1982).

In this case Greg Wood testified that he went into open court on May 26, informed the trial court that Dunn's case was settled on May 25, and thereby canceled the trial date that was scheduled. However, there is no transcript of this appearance, and the record does not show whether Sims's attorney was present. The case action summary sheet contains only the following entry: "5-25-90: ptoposed settlement agreement." There is no notation elsewhere in the record concerning an appearance by either Wood or Dunn in regards to the settlement, nor is there any further mention of the agreement itself. The trial court never

Appendix I

AUG 27 1993

STATE OF ALABAMA - - -JUDICIAL DEPARTMENT

THE COURT OF CIVIL APPEALS
SPECIAL TERM 1993

2910348

Willie J. Dunn, et al.

v.

Wilma D. Sims

Appeal from Talladega Circuit Court

After Remand from Supreme Court

Wright, Retired Appellate Judge

Whereas, on May 28, 1993, the Supreme Court of Alabama entered its judgment reversing the judgment of this court entered on April 24, 1992;

Therefore, it is now the judgment of this court that its judgment of April 24, 1992, be, and is, set aside, and the judgment of the Circuit Court of Talladega County, Alabama, be in all respects affirmed.

The foregoing was prepared by Retired Appellate Judge L. Charles Wright while serving on active duty status as a judge of this court under the

provisions od § 12-18-10(e), Code 1975, and this opinion is hereby adopted as that of the court.

AFFIRMED.

All the judges concur.

I, John H. Wilkerson, Jr. Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 27th day of Aug. 1993.

John H. Wilkerson, Jr.

Clerk, Court of Civil Appeals of Alabama

Appendix J

IN THE SUPREME COURT OF ALABAMA

MAY 28, 1993

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims). (2910348) (Talladega: CV-84-077)

CERTIFICATE OF JUDGMENT

Whereas, on August 21, 1992, a Writ of Certiorari to the Court of Civil Appeals was granted by this Court, and the cause was set down for submission pursuit to Rule 39, Alabama Rules of Appellant Procedure,

Whereas, came the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, IT IS CONSIDERED AND ORDERED that the judgment of the Court of Civil Appeals be reversed and annulled and this case is remanded to the Court of Civil Appeals with instructions to enter an appropriate order. NO COSTS TAXED.

OPINION BY MADDOX, J

Houston, Kennedy and Ingram, JJ., concur
Shores and Adams, JJ., concur in the result.

I, Robert G. Esdale; as Clerk of the Supreme Court of Alabama do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear (s) of record in said Court.

Witness my hand this 8th day of Sept., 1993.

Robert G. Esdale

Clerk, Supreme Court of
Alabama

Appendix K

THE STATE OF ALABAMA - - -JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
SEPTEMBER 8, 1992

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THECOURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims) (29103 48)

NOTICE

Respondent granted to September 11, 1992 to file brief.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 8th day of Sept., 1992.

Robert G. Esdale/nst

Clerk, Supreme Court of
Alabama

Appendix L

THE STATE OF ALABAMA - - -JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

March 31, 1992

1910396

Willie J. Dunn, et al.

v.

Talladega Circuit Court
CV-84-077

Wilma D. Sims

ORDER

It appears to the Court that this cause is within the appellate jurisdiction of the Court of Civil Appeals.

IT IS, THEREFORE, ORDERED that this cause is transferred to the Court of Civil Appeals.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 31st day of March, 1992.

Robert G. Esdale

Clerk, Supreme Court of Alabama

Appendix M

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
August 21, 1992

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims) (2910348)

ORDER

Petition for writ of certiorari to the Court of Civil Appeals is granted. Se Rule 39(f) and (h), Alabama Rules of Appellate Procedure, for instructions regarding the filing of additional briefs and oral argument.

PER CURIAM - HORNSBY, CJ., MADDOX, SHORES, HOUSTON AND KENNEDY, JJ.

PLEASE USE THE ABOVE CASE NUMBER ON ALL FILING IN CONNECTION WITH THIS CASE.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 21st day

of Aug., 1992.

Robert G. Esdale/nst
Clerk, Supreme Court of Alabama

Appendix N

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
November 17, 1992

1911395

Ex parte Wilma D. Sims. **PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS** (In re: Willie J. Dunn, et al. v. Wilma D. Sims) (2910348)

NOTICE

Motion of Pioneer Financial Services, Inc. to file amicus curiae briefs granted and briefs filed.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Robert G. Esdale
Clerk, Supreme Court of Alabama

FILED
NOV 9 1993
OFFICE OF THE CLERK

No. 93-617

In The

Supreme Court of the United States

October Term, 1993

WILLIE J. DUNN,

Petitioner,

versus

WILMA D. SIMS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES P. GAINES
Counsel of Record

GAINES, GAINES, GAINES
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Counsel for Respondent,
Wilma D. Sims

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

Was there a misapplication of the law or were Petitioner's rights to procedural due process violated when the Supreme Court of Alabama concurred with the trial court's order enforcing a settlement agreement between the parties?

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STATUTES

Section 34-3-21, *Code of Alabama* (1978) ..... *passim*

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OPINIONS BELOW

The order of the Circuit Court of Talladega County, Alabama enforcing the settlement agreement between Petitioner and Respondent is reproduced as Appendix C to Petitioner's (hereinafter "Mr. Dunn") Petition for a writ of certiorari. The decision of the Supreme Court of Alabama granting the Respondent's writ of certiorari and finding the settlement agreement was due to be enforced is reproduced as Appendix A to Mr. Dunn's Petition for a writ of certiorari. The Supreme Court of Alabama's decision denying Mr. Dunn's application for rehearing is reproduced as Appendix G to his petition for writ of certiorari.

The order affirming the order from the Circuit Court of Talladega County entered by the Alabama Court of Civil Appeals is reproduced as Appendix I to Mr. Dunn's Petition for a writ of certiorari.

JURISDICTION

The Petition for a writ of certiorari was filed by Mr. Dunn within ninety (90) days of the date the application for rehearing was denied. Mr. Dunn erroneously invokes the jurisdiction of this court pursuant to Section 28 U.S.C. Section 1254(1). The lower court's decision is not from a court of appeals but was a judgment rendered by the Supreme Court of Alabama. This court's jurisdiction is found under 28 U.S.C. Section 1257.

STATEMENT OF THE CASE

I

Introduction

Mr. Dunn's Petition arises out of an Order enforcing a settlement agreement between the respondent Wilma Sims ("Sims") and Mr. Dunn individually and as administrator of the Estate of Lelia P. Dunn. Mr. Dunn's petition is filed only on his behalf. Sims moved for an Order enforcing a written settlement agreement between the parties and after a hearing on the motion, the trial court granted Sims' motion enforcing the settlement agreement. On appeal, the Alabama Court of Civil Appeals reversed the trial court however the Supreme Court of Alabama, after reviewing the evidence submitted to the trial court and briefs by both parties as well as the amicus curiae brief of Pioneer Financial Services, Inc., determined that the Court of Civil Appeals misapplied the law pertaining to settlement agreements. In so doing, the Supreme Court of Alabama found the settlement agreement between petitioner and respondent did comply with the provisions of Alabama *Code* Section 34-3-21 and was therefore due to be enforced. The Court of Civil Appeals was reversed and the cause remanded with instructions to enter the appropriate order enforcing the settlement agreement. Mr. Dunn filed an application for rehearing claiming denial of due process and equal protection rights and a misapplication of the law. The Supreme Court of Alabama reconsidered the issues raised by Mr. Dunn and in denying his application for rehearing, rejected his arguments that his due process and equal protection rights had been violated or that there had been a misapplication of the law.

The basic facts confirming the existence of a settlement agreement are not in dispute and a review of these facts confirms the issue of whether the agreement was enforceable was presented before the trial court where Mr. Dunn had a full opportunity to present the arguments now raised in his petition for a writ of certiorari. A factual review confirms the Supreme Court of Alabama's decision finding the settlement agreement met the requirements of Section 34-3-21, *Code of Alabama* (1975) and was due to be enforced was correct.

II

UNDERLYING FACTS

Mr. Dunn was involved in an automobile accident with Sims in 1983. Prior to the trial of this case Mr. Dunn and his attorneys negotiated a settlement with Sims' attorney and reduced that agreement to writing. The settlement agreement was signed by Dunn and both of his attorneys. During the course of negotiations Mr. Dunn was represented by his two attorneys. He was present with his attorney conducting negotiations on his behalf, directly participated in those negotiations and was fully aware of the terms of the settlement. An attorney for Mr. Dunn drafted a settlement agreement which provided Sims would pay $6,200.00 to Dunn and $300.00 to his mother. Mr. Dunn then executed that agreement along with his attorneys. The trial court was advised a settlement had been reached and the scheduled trial was cancelled. Shortly thereafter Dunn refused to be bound by the settlement agreement and shortly thereafter, both of Dunn's attorney's withdrew as Mr. Dunn's counsel and

were awarded attorney's liens to collect their fees claimed under the settlement agreement.

III

PROCEDURAL HISTORY OF THE CASE

Ms. Sims filed a motion seeking enforcement of the settlement agreement. After a lengthy hearing on the motion to enforce the settlement agreement, the trial court found an agreement for settlement of the case had been reached between the attorneys for the parties, Mr. Dunn was fully aware of the terms of the settlement, the settlement agreement was reduced to writing and was executed by Mr. Dunn individually and as administrator of his mother's estate. The court further found the attorneys for the parties advised the court the case had been settled and the scheduled trial was cancelled. The trial court found the settlement agreement was due to be enforced and directed Sims to pay the settlement proceeds to the Circuit Clerk of the Court. The settlement proceeds were paid pursuant to the trial court's Order.

After the motion for enforcement of the settlement agreement was granted, Mr. Dunn filed motions seeking reconsideration and other relief which were denied by the trial court. Mr. Dunn filed a notice of appeal to the Alabama Court of Civil Appeals which reversed the trial court's ruling enforcing the settlement agreement. Ms. Sims' application for rehearing to the Court of Civil Appeals was denied. Ms. Sims petition for a writ of certiorari to the Supreme Court of Alabama was granted and that court found the settlement agreement did meet the requirements of Section 34-3-21, *Code of Alabama*

(1975) and was due to be enforced. The judgment of the Court of Civil Appeals was reversed and the cause remanded with instructions to enter an appropriate order. Mr. Dunn's application for rehearing to the Supreme Court of Alabama was denied. The Alabama Court of Civil Appeals set aside its judgment, affirmed the judgment from the trial court in the Circuit Court of Talladega County, Alabama and adopted the opinion rendered by the Supreme Court of Alabama.

In his application for rehearing to the Supreme Court of Alabama, Mr. Dunn presented the same argument he now presents to this court in his petition for a writ of certiorari. Mr. Dunn argued that his rights to due process and equal protection had been violated and there had been a misapplication of the law relative to the enforcement of settlement agreement. The Court rejected the same arguments Mr. Dunn makes to this Court by denying the application for rehearing and confirming the trial court's finding the settlement agreement was due to be enforced.

SUMMARY OF REASONS FOR DENYING THE WRIT

The petition should be denied because Mr. Dunn's right to due process and equal protection has not been violated in this case. Mr. Dunn received the requisite process necessary to satisfy all constitutional requirements of due process and equal protection. The petition should also be denied because the Supreme Court of Alabama properly found Section 34-3-21 did govern settlement agreements reached at the trial level and the

settlement agreement between Mr. Dunn and Sims met all requirements for a valid agreement. Additionally, this case was reviewed by the Honorable Ira DeMent, United States District Judge in *Spurlock v. Pioneer Financial Services*, 808 F. Supp. 782 (MD Ala. 1992) and Judge DeMent specifically found Section 34-3-21 does control the making of settlement agreements which are entered into before the case is appealed. In its decision finding the agreement was enforceable, the Supreme Court of Alabama specifically referred to Judge DeMent's ruling and agreed with his interpretation on that issue.

REASONS FOR DENYING THE WRIT

I.

Mr. Dunn's right to due process and equal protection has not been violated in this case. The right to due process under the Fourteenth Amendment of the United States Constitution requires that some form of a hearing is necessary before an owner is deprived of a protective property interest. *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 102 S. Court 1148 (1982). Mr. Dunn was provided several hearings at the trial court level as a result of numerous pleadings he filed on his behalf. At the hearing for the respondent's motion to enforce the settlement agreement Mr. Dunn was allowed the opportunity to cross-examine witnesses and present his arguments to the trial court. Mr. Dunn had advance notice of the hearing and was present and given an opportunity to be heard. His "property interest" i.e. his cause of action, was not taken away without notice and the opportunity to be

heard. In addition to having his day in court at the trial level, Mr. Dunn had the opportunity and exercised his right to present his case to the Alabama Court of Civil Appeals. He again had the opportunity and exercised his right to present his arguments to the Supreme Court of Alabama which granted the respondent's petition for writ of certiorari. Mr. Dunn then had another opportunity and in fact did present the same arguments to the Supreme Court of Alabama that he is making here and that court rejected those arguments. Mr. Dunn's rights to due process and equal protection have not been violated in this case.

II.

Another reason for denying Mr. Dunn's petition is that the Supreme Court of Alabama properly applied the law which governs enforcement of settlement agreements. Section 34-3-21, *Code of Alabama* (1975) provide: "An attorney has authority to bind his client in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the Court." It is undisputed and even Mr. Dunn admits, a settlement agreement negotiated by his attorneys with Sims was reached, reduced to writing and signed by Mr. Dunn and both of his attorneys. (App. A) The trial court and the Supreme Court of Alabama found the agreement met the requirements of Section 34-3-21 and was due to be enforced. This issue and this case were reviewed by Judge Ira DeMent, United States District Judge in the Middle District of Alabama who was faced with a similar issue. Judge DeMent specifically found Section 34-3-21 governs settlement agreements reached

while a case was at the trial level. In agreeing with Judge DeMent, the Supreme Court of Alabama specifically noted there was some confusion among the bench and bar relative to settlement agreements and specifically took the opportunity in this case to guide the bench and bar in future cases on this subject. Section 34-3-21 governs settlement agreements reached at the trial level and the agreement between petitioner and respondent was binding and due to be enforced.

CONCLUSION

The law regarding settlement agreements was properly applied. Mr. Dunn's rights to due process have not been violated in this case. He has exercised several opportunities to present the arguments he presents to this Court and although those arguments against enforcement of the agreement have been disjointed and difficult to follow, they have nevertheless been presented and reviewed on several occasions. Unfortunately for Mr. Dunn, the Supreme Court of Alabama confirmed Sims was entitled to enforcement of the settlement agreement. Mr. Dunn entered into a valid agreement with Sims and regardless of what reasons he now wishes not to be bound by that agreement, he is bound by it. Being required to honor a valid agreement is not a violation of Fourteenth Amendment rights to due process or equal

protection. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

/s/ Charles P. Gaines
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APPENDIX A

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May 25, 1990

B. Greg Wood
William E. Hollingsworth, III
Jeffrey A. Willis

James H. Sharbutt
Retired Circuit Judge
Of Counsel

SETTLEMENT AGREEMENT

WILLIE J. DUNN, etc., et al.,

VS.

WILMA SIMS

This case settled this date as follows:

Claim of Leila P. Dunn	$ 300.00
Claim of Willie J. Dunn and Susan Dunn	6200.00

Settlement amounts are inclusive of Court Cost, deposition cost and all expenses of the case.

Attorneys' fee will be 30% of the above amounts. Attorneys waive their out of pocket expenses to date. Charges of Dr. Vincent for deposition, if charged, will be paid by Willie J. Dunn.

The amounts to be reimbursed for clients' share will be:

To Estate of Leila Dunn:	$ 210.00
To Willie J. Dunn and Susan Dunn:	4340.00

AGREED this 25th day of May, 1990.

/s/ Willie J. Dunn
Willie J. Dunn,
individually and as
Administrator

/s/ Greg Wood
B. Greg Wood

/s/ Paul A. Phillips
Paul A. Phillips

Supreme Court, U.S.
FILED
NOV 30 1993
OFFICE OF THE CLERK

No. 93-617

DISTRIBUTED
DEC 2 1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIE J. DUNN,

Petitioner

versus

WILMA D. SIMS,

Respondent.

On Petition For Writ Of Certiorari To The
Supreme Court Of Alabama

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Cushman, R.E. & R.F. Cushman (3rd) Cases in Constitutional Law, (1968) 10

Reply To Respondent's Brief

Comes now petitioner pursuant to Rule 15.6, Rules of The Supreme Court and replies to respondent's brief in opposition and admits, denies, avers, and alleges as follows:

Reply To Argument
I

Denies. Avers that the record is very clear on these violations. While we do not wish to recite the complete record, we do however, feel that it is prudent to call this Court's attention to relevant facts: (1) the trial court heard respondent's motion and entered an order on the same day (R-279; R-285); (2) the trial court refused to hear seven of petitioner's motions (R-309); (3) the trial court prejudiced petitioner beyond recovery when it allowed three different attorneys to come before it and represent defendant (R-304-9); (4) respondent failed to give notice that it would adduce oral testimony from petitioner's former attorney (R-445); and (5) petitioner did not have an opportunity to offer rebuttal testimony to wit:

> [The] plaintiff should have been given notice that testimony was to have been taken upon oral argument. Too, plaintiff should have been told that defendant had planned to adduce testimony from a witness...
>
> Indeed, the Honorable Judge Sullivan's testimony should have been offered in rebuttal.
>
> Plaintiff's Objection To The Court's Order Entered On August 13, 1991, (R-453)

Avers that his due process rights were violated because he was not given proper notice, to wit:

> Q ...had I known this was going to be a full blown trial I would have prepared for it. (CRT[1], R-29)
>
> Q Your honor, just bear with me for a minute...if I had known this was going to be a trial I would have had this ready. (CRT, R-34)

This Court dealt with a similar situation in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and held that at a minimum, due process required that before a litigant could be deprived of his property he must be given notice and an opportunity for a

1. "CRT" references Court Reporter's Transcript.

hearing. We admit that we were given notice; however our contention is that the notice did not apprise us of the defendant's intent to call for a witness, petitioner's former attorney such that he (petitioner) could offer rebuttal testimony. Similarly, in Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113, this Court held that the "Fourteenth Amendment requires an opportunity...granted at a meaningful time and in a meaning manner...for [a] hearing appropriate to the nature of the cause." Our contention therefore, is that the notice was not to the nature of the cause. Alleges that respondent knew and the trial court too that petitioner's former attorney had been subpoenaed as a court reporter was set-up to take testimony. Never before had that been done. Clearly petitioner was denied his right to offer rebuttal testimony.

It is generally understood that procedural due process, as guaranteed by the Fourteenth Amendment, requires fair play, which includes proper notice and an opportunity to present opposing

party to controvert testimony. 16A, Am.Jur.2d, Constitutional Law, §839(1979).

Avers further that the Due Process Clause guarantees against unjustified feelings of unjust treatment. Petitioner was made to feel that he was unjustly treated when the trial court told he to "Get yourself a lawyer." Petitioner had a statutiorial right to try his own case. Being as he was the only Black in the courtroom and such comments caused the all whites to bust into laughter. Clearly prejudicial and merits the granting of the writ on the ground that petitioner could not and did not get a fair trial. In Re Murchison, 75 S. Ct. 623, this Court reversed when the fact showed that Murchison did not get a fair trial before a fair tribunal. Petitioner here contents that he too did not get a fair trial and that he did not have a fair tribunal (See R-300, Petition for Writ of Manadmus).

Admits. Avers that the trial court denied petitioner procedural due process rights, to wit: when respondent motioned to enforce the settlement

agreement, petitioner had an application for a writ of manadamus before the Supreme Court of Alabama. The writ sought an order to remove the trial judge on the ground that he had abused his discretion and that petitioner could not get a fair trial. The petition was denied on May 31, 1991. Petitioner had 14 days, including June 14, 1991, to petition for a rehearing. The trial court issued its "Notice" on the hearing of the motion on June 13, 1991. Petitioner filed his petition for rehearing on June 14, 1991, in accordance with Rule 21(e)(1-3), Alabama Rules of Appellate Procedure ("ARAP"). Clearly denial of procedural due process (R-453; R-455).

Admits. Avers that petitioner's argument was that under Bowman v. Integrity Credit Corp., 507 So.2d 104 (Ala.Civ.App.. 1978) the settlement agreement did not meet the requirements of the law (CTR, R-49). First, the settlement agreement was not entered on the record, to wit:

Attorney Ralph Gaines, III

Q As stated earlier I do not see

an entry of the settlement agreement entered into by you on May 25, 1990.

Q So, you don't see one. Does that mean there is one or is not one?

A That means for the months of March through June of 1990, I didn't see one on the docket.

Secondly, there was no record of it on the case action summary sheet, to wit:

The Honorable William Sullivan

A Was there any notation at all?

The Court: No notation.

Thirdly, the trial court did not enter an order dismissing the case, to wit:

A Was any order entered on this particular one ?

The Court: No, there wasn't.

Admits. Petitioner's contention is that respondent failed to give he notice that his former attorney had been subpoenaed (R-445); that arrangements had been made to have a court reporter present to record oral testimony; and that oral testimony would in fact be adduced from a witness. In other words, due process is "any proceeding...authorized

by law and sanctioned by usage. Any proceeding which supercedes or displaces the aforesaid can not be regarded as due process of law." Clearly petitioner was deprived of his "property interest" because he was not given proper notice. This Court has granted a writ when an order would result in the deprivation of such important constitutional protected rights such as the ones in this case. For example, in Mullane, supra, at 313, 70 S.Ct. at 656, this Court granted a writ under similar circumstances.

Petitioner's contention is not that he did not have his day in court; quite the contrary. His contention is that neither the trial court or the appellate courts addressed his claims of denial, abridgement and/or violation of procedural, statutorial and constitutional guaranteed due process rights. That whatever the trial court did, it had to do it in accordance with due process of law. Clearly it didn't. We urge this Court to review the facts to determine the extent to which petitioner's constitutional rights were

abridged.

Admits. Avers that respondent's theory of recovery was pursuant to Rule 47, ARAP, to wit:

> Rule 47 of the Alabama Rules of Appellate Procedure is depositive of the issue concerning the enforcement of an agreement reached between the parties.
>
> Brief Of Appellee, Wilma D. Sims, p. 11

Admits. Avers that the Supreme Court of Alabama never considered the issue of whether petitioner's rejection of the settlement agreement and the trial court's continuance of it, in juxaposition with respondent's failure to file an objection or an affirmative defense under Rule 12(g) ARCP, estopple the case and thus assert his right to enforce the settlement agreement. Failure to do so rendered it null and void and unenforceable. Avers further that the court rendered an opinion which mirrowed the argument of amicus curiae to the extent that Rule 1, ARAP placed limitations on the applicability of Rule 47, ARAP; an issue which respondent never raised nor preserved at the trial court level. The writ should be granted

to determine whether an appellate court may decide a case on an issue not properly preserved in the court below. There can be no doubt of the right of a reviewing court to reverse upon an issue not raised at the trial court level to prevent a plain miscarriage of justice." Hilvering v. Rubinstein, 124 F.2d 969, 972 (8th Cir.) Admits. Denies that petitioner makes the same argument here that he made at the Supreme Court of Alabama. Denies. Denies. and denies.

XI

Denies. Avers that the court's opinion rested on an issue that was only raised by amicus curiae. Petitioner contents that the court erred on the ground that a settlement agreement didn't exist, to wit: Judge Sullivan, the trial judge, by virtue of the judicial power[2] vested in he by statute, accepted petitioner's rejection of the settlement agreement by his continance of the case. Respondent accepted the terms and conditions of the continuance by his actions: she failed to object and to file a Rule 12(g) ARCP motion to

estopple it. Respondent simply acquiesced. (See 4 C.J.S., Appeal & Error, §212, Acceptance of Terms and Conditions). Avers further that neither the Supreme Court nor the trial court considered the issue of denial, abridgement and/or violation of petitioner's constitutional rights under the Fourteenth Amendment. The writ should be granted to determine that petitioner's reliance upon Judge Sullivan's judicial power[2] was not misplaced. Equally, the writ should be granted to determine whether the Supreme Court of Alabama erreonously applied the law under Spurlock, supra, vis-a-vis a statute diluted constitutional guaranteed rights.

Admits. Denies and denies, admits, admits and admits and admits. Avers that petitioner's contention is that respondent waiver any right to enforcement as per our argument herein. Admits and denies and admits. Avers that the dispute is

1. Judicial power means the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision. Cases in Constitutional Law, p. 31.

whether a settlement agreement existed. Avers that the trial court's opinion was pursuant to Rule 47, ARAP, (CRT,R-5), and that the Supreme Court's was the cincture of the argument of amicus curiae. Denies and denies. Avers that Spurlock, supra, did not present similar issues. Admits. Admits and admits and admits and admits. Avers that the Supreme Court of Alabama erred for the reasons cited herein. Denies. Avers that the facts of a case would determine this. Denies and denies.

Reply To Summary Of Reasons For Denying The Writ

Denies. Avers that the petition should be granted because of the importance of this case. Its importance lies in the deprivation of significant constitutional guarantees, namely the denial, abridgement, and/or violation of Fourteenth Amendment rights under the Due Process and Equal Protection Clause. Denies and denies. Avers that neither the trial court or the appellate courts were cloth with constitutional federal grant of authority to address petitioner's claims arising under the U.S. Constitution. Denies and avers that

the opinion of the Supreme Court of Alabama was based on an issue first raised on appeals. This Court as a general rule has revered appellant courts in deciding issues first raised on appeals. Denies and avers that a valid settlement agreement did not exist. Admits and avers that the Spurlock, supra, court found that the respondent waited for over a year before attempting to enforce the settlement agreement. Denies and avers that whether Judge Dement found that Section 34-3-21, Code of Alabama(1975) controls the making of a settlement agreement is not at issue in this case. We submit that what is at issue in this case is whether the petitioner's constitutional rights were denied, violated and/or abridged. Obviously, respondent's argument is without merit on the ground that the argument fails to address the importance of these constitutional guarantees. Admits and admits. Avers that the Supreme Court of Alabama erred in applying Spurlock, supra, to the facts of this case.

Reply To Questions Presented

Denies. Avers that the question to be decided by this Court is whether the Due Process and Equal Protection Clause of the Fourteenth Amendment vindicate the denial, abridgement and/or violation of constitutional rights.

Reply To Opinion Below

Admits. Avers that for this Court to glean the full flavor of the importance of this case, the Alabama Rules of Civil Procedure, specially Rule 5, Rule 12(g) and Rule 78; the Alabama Canons of Judicial Ethics(1975), Canon 3(C)(1)(a); the Alabama Rules of Appellate Procedure, Rule 47; and the Constitution of the State of Alabama(1901), Article I, Section 6, should be reviewed in tandem with the opinions relevant to the facts and specific constitutional guarantees this case presents. Admits. Admits and admits. Admits.

Admits.

Reply To Statement of Jurisdiction

Admits. Admits. Admits. Admits. Avers that this Court's jurisdiction was invoked at the trial court level and thus this Court has grant of juris-

diction.

Reply To Respondent's Statement Of The Case

Denies and admits and admits. Admits. Admits and admits. Avers that petitioner's objection preserved this issue for review (R-343; R-436; R-439; R-453). Admits, denies and admits as well as admits. Denies. Avers that the opinion rested on an issue first raised on appeals by amicus curiae. Admits and admits. Admits and denies. Avers that petitioner's application for rehearing was pursuant to Rule 39(k), ARAP, requesting the court to correct material facts and to delete its erronous conclusion. Admits and admits and admits.

Denies and admits, denies. Denies and denies.

Reply To Underlying Facts

Admits. Admits and admits and admits. Admits and admits. Admits. Denies, denies and admits. Admits and admits, denies. Avers that in as much as respondent has not denied relevant facts presented by petitioner-upon which this case rests-this Court may accept them at fact value. Alleges therefore that respondent has intentionally

withheld relevant and material facts of this case. Facts which would have shown the extent to which petitioner's constitutional rights were abridged; e.g., respondent knew that the trial court granted their motion on the same day it was made and entered an order therewith. Petitioner urges this Court to review the facts as found in the record.

Reply To The Procedural History Of The Case

Admits. Avers that the motion was made pursuant to Rule 47, ARAP and Section 34-3-21, Code of Alabama(1975). Avers petitioner filed objections (R-343; R-436) which preserved the issue for review. Admits. Avers that respondent failed to give petitioner proper notice (R-453) causing he to be totally and completely surprised (R-453 at n. 1), admits, admits, and admits and admits. Denies. Avers that the court found that no such was on the record (CRT,R-66) and denies. Admits. Avers petitioner filed an objection to its enforcement (R-453) and admits. Admits proceeds were paid to the trial court. Denies proceeds were paid to petitioner.

Admits and admits. Avers that the trial court did not hear all such motion (R-457). Avers that petitioner filed objection (R-436/439; R-446; R-453). Denies. Avers that the notice was to the Alabama Supreme Court. Admits. Admits. Admits and denies. Avers that the court's opinion rested on an issue not properly preserved in the court below and one which was raised by amicus curiae on appeals. Admits and admits. Admits. Admits, admits and admits.

Demies. Admits and admits and admits. Denies and admits.

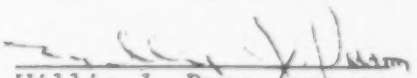
Reply To Conclusion

Denies. Denies. Denies and denies and denies, denies, denies. Admits. Avers that petitioner was deprived of his property interst because his due process and equal protection rights were denied by the Supreme Court of Alabama. Denies. Avers that petitioner entered into the agreement under duress. Denies. Petitioner had a right to reject a settlement agreement which was unjust, unfair and which did not pay he for his pain and

suffering or which did not cover his out-of-pocket expenses. Denies that any such agreement existed. Denies.

Petitioner invoked the protection of the Fourteenth Amendment at an early stage of these proceedings. The question of denial, abridgement and/or violation of constitutional guaranteed rights is a question of federal law and is to be determined by this Court. This Court has granted a writ in cases similar in importance.

Respectfully submitted,



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